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No. 83-912

In The Supreme Court of the United States

October Term, 1983

EDWARD LUCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

UNITED STATES V. EDWARD LUCE

CR NO. 81-20341

DATE	PROCEEDING
12/17/81	Indictment

1/20/82	Order on Arraignment (1-15-82, Not Guilty . . .)
3/22/82	Jury Trial Begins
3/23/82	Deft. moved for judgment of acquittal— OVERRULED *as to Cts. 1 & 3;* *UNDER ADVISEMENT AS TO CT. 2.*
3/23/82	Motion *In Limine* to Exclude Impeachment by Evidence of Conviction
3/23/82	Memo in Support of Motion
3/24/82	Motion For Judgment of Acquittal as to Ct. 2— OVERRULED. Deft. Luce calls 2 witnesses; DEFENSE RESTS, JURY BEGAN DELIBERATIONS
3/25/82	Jury returned verdict of GUILTY as to *Cts. 1 & 3* & NOT GUILTY as to Ct. 2
3/25/82	VERDICT—GUILTY as to Cts. 1 & 3; & NOT GUILTY as to Ct. 2
3/29/82	Order on jury verdict
3/31/82	DEFT'S MOTION AND MEMORANDUM FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL CHJW
4/2/81	ORDER (*Filed 4-1-82:* Above motion for Judgment of Acquittal or New Trial— *OVERRULED*) CHJW, USA & PROB; mailed Marcus
5/18/82	*Disposition Hearing*: Ct. 1: 4 Yrs. impr., $3,000.00 committed fine. Ct. 3: 4 yrs. impr., 3 yrs. SPT, $3,000.00 committed fine. impr. to run concurrently.
5/24/82	Judgment and Commitment Order
5/18/82	Notice of Appeal

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CASE NO. 82-5236

DATE	PROCEEDING
6/7/82	Copy of notice of appeal, filed; and cause docketed
8/9/82	Judgment of the District Court affirmed (Kennedy, Peck and Allen, Opinion by Kennedy (COSTS NONE)
8/23/82	Petition for rehearing of appellant, Luce, with suggestion en banc (m-8/22)
10/3/82	Order denying petition for rehearing (Kennedy, Peck and Allen, JJ.)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 81-20341-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD LUCE, et al.,

Defendant.

MOTION IN LIMINE TO EXCLUDE
IMPEACHMENT BY EVIDENCE OF CONVICTION

Now Comes the Defendant, EDWARD LUCE, by his attorney, JAMES I. MARCUS, and respectfully moves this Honorable Court as follows:

1. The government plans to introduce at trial evidence that Luce was convicted by an Illinois state court in 1974 for possession of marijuana, a conviction for which he received a sentence of eighteen months probation, under the provision of 56 ½ §710 Ill. Rev. Stat. (Ex. 1). Luce intends to testify in his own behalf.

2. Evidence of this conviction should be excluded as impeachment since the provision of 56 ½ §710 provides that upon fulfillment of the conditions of probation the criminal proceedings shall be dismissed, and no conviction shall be entered. Luce successfully completed his probationary period.

3. Moreover, this evidence does not constitute proper impeachment under Rule 609 of the Federal Rules of

Evidence. The conviction is not admissible under 609 (a) (2), because the crime does not involve dishonesty or false statement, nor is it admissible under 609 (a) (1), because the probative value of the evidence does not outweigh its prejudicial effect to the Defendant.

Wherefore, Defendant EDWARD LUCE prays that this court enter an order in limine absolutely prohibiting the government from introducing evidence of Defendant Luce's 1974 conviction for possession of marijuana, or from inquiring into such conviction on cross-examination.

Respectfully submitted,

James I. Marcus
Attorney for Defendant Luce

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 81 20341-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD LUCE, et al.,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE IMPEACHMENT BY EVIDENCE OF CONVICTION

Now Comes the Defendant, EDWARD LUCE, by his attorney, JAMES I. MARCUS, and hereby submits his memorandum in support of Motion in Limine to Exclude Impeachment by Evidence of Conviction of a Crime.

In 1974 Defendant Luce was convicted in Illinois by a state court of possession of marijuana, thereafter, he was sentenced under the Cannabis Control Act (eff. date 8/16/71), and placed on probation pursuant to 56 ½ §710. There was no violation of probation and the Defendant successfully completed his probationary sentence. We submit that this is dispositive of this issue. However, in the event the court disagrees we make the alternative argument that the conviction would be improperly admitted under Rule 609.

Under Rule 609 of the Federal Rules of Evidence, impeachment by means of a criminal conviction is only permitted in 2 circumstances: first, if the crime was a felony

and its probative value outweighs its prejudicial effect to the Defendant 609 (a) (1), and *second*, if the crime involved dishonesty or false statement by 609 (a) (2).

Additionally, the government bears the burden of showing that the probative value of the conviction outweighs its prejudice to the Defendant. *United States v. Mahone*, 537 F. 2d 922 (7th Cir. 1976), *cert. denied*, 429 U.S. 1025 (1970). The factors to be considered by the court in balancing the probative value against the prejudice to the Defendant were set forth by then Judge Burger now Chief Justice in *Gordon v. United States*, 127 U.S. App. D.C. 343, 383 F. 2d 936, 940 (1967):

1. The impeachment value of the prior crime.
2. The point in time of the conviction and the witness' subsequent history.
3. The similarity between the post crime and the charged crime.
4. the importance of the defendant's testimony.
5. the centrality of the credibilty issue.

Accord, United States v. Sims, 588 F. 2d 1145, 1149 (6th Cir. 1978).

A prior narcotics conviction is of little impeachment value, because it bears little if any relevancy to veracity. *United States v. Puco*, 453 F. 2d 539, 542 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1971). Further, although the conviction falls within the ten year limit of Rule 609 (b), the fact that the conviction is eight years old and that the Defendant has had no further convictions clearly reduces the evidence's probative value.

The greatest prejudice to the Defendant, however, is caused by the similarity between the prior crime and the

crimes with which Defendant is being charged, here possession of cocaine and conspiracy to possess cocaine.

As the Fifth Circuit has noted, "the danger of unfair prejudice is greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence." *United States v. Martinez,* 555 F. 2d 1273, 1275 (5th Cir. 1977). In *United States v. Puco,* 453 F. 2d 539 (2d Cir. 1971), *cert. denied,* 414 U.S. 844 (1971), the trial court committed reversible error in permitting a prior narcotics conviction to be used to impeach a Defendant on trial for violation of federal narcotics laws. The court stated:

> The propensity of Puco's narcotics conviction to "influence the minds of the juror's improperly", [citation omitted] needs little elaboration. Reference to a defendant's criminal record is always highly prejudicial. The average jury is unable, despite curative instructions, to limit the influence of a defendant's criminal record to the issue of credibility. *Cf. Bruton v. United States,* 391 U.S. 123 (1968). The potential for prejudice moreover, is greatly enhanced where, as here, the prior offense is similar to the one for which the defendant is on trial" 453 F. 2d at 542.

Similarly, in the instant case, the jury may well be tempted to use the prior narcotics conviction to convict Luce on a "bad man" theory. Further, if Luce is forced to run the risk of being impeached, he will be denied the opportunity to take the stand and convince the jury of his innocence.

Since the slight probative value of this impeachment evidence does not outweigh its prejudice to Luce, the evidence is inadmissible under Rule 609 (a) (1). Nor is the

evidence admissible under 609 (a) (2), since the conviction for possession of marijuana did not involve a crime of dishonesty or false statement. The Report of the conference committee states:

> By the phrase "dishonesty and false statement" the conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crime false, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused; propensity to testify truthfully. Conf. Rep. No. 93-1597, 93 Cong. 2d Sess. 9, *reprinted in* [1974] U.S. Code Cong. & Admin. News, pp. 7098, 7103.

Possession of marijuana clearly does not fall within the class of cases to which the Conference Report refers. *See United States v. Hastings,* 577 F. 2d 38, 41 (8th Cir. 1978); *United States v. Thompson,* 559 F. 2d 552, 554 (9th Cir. 1977), *cert. denied,* 434 U.S. 973.

Since the Defendant's 1974 conviction for possession of marijuana is not admissible under either Illinois law or Rule 609 (a) or (2), Defendant Luce's motion in limine should be granted.

Respectfully submitted,

JAMES I. MARCUS
Attorney for Defendant Luce

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• • •

EXCERPTS OF TRIAL IN
UNITED STATES v. LUCE, et al.
MEMPHIS, TENNESSEE
TUESDAY, MARCH 23, 1982

• • •

(p. 336) THE COURT: Now, we are aware, also, that the defendant in this case has moved to limit the government, because we think that this bears on the same kind of question here, is the defendant to be faced with evidence if he testifies, Mr. Luce, of a 1974 offense under the Illinois law.

• • •

(p. 337) That's the pertinent part of the purported section 710 under Chapter 56 and a half, apparently, of the Illinois laws.

Do you want to be heard in that respect, Mr. DiScenza?

MR. DISCENZA: Yes, Your Honor, I do. Because our indication is that he was not discharged under that section.

• • •

(p. 339) THE COURT: Whose burden is it to establish that?

MR. MARCUS: I think it is the government's. The government's clearly, if they are going to use the impeachment evidence, it is there [sic] burden.

I have an argument that I wish not abandon at this point in 609 . It is clearly the government's. If I impeach

one of their witnesses, and they don't answer with respect to a conviction, they say they were never convicted, I am sure that the court would —

THE COURT: What is your evidence, Mr. DiScenza, that he was convicted.

MR. DISCENZA: Number one, I can ask him about conviction. I can't prove it extrinsically anyway, the rule is pretty clear on that. The rule is, and the case law, if I have knowledge to support my question, I may ask him about a conviction that has carried a penalty in excess of one year or involves moral turpitude or theft, I mean, dishonesty, that is the law that I can ask him about that.

• • •

(p. 346) THE COURT: All right. Well, the question before the court is, then who has the burden of establishing whether it is a viable conviction.

And it is the defendant's position that it has been expunged under section 710.

• • •

(p. 347) MR. MARCUS: Judge, I have an alternate argument that I suggest. I have not prepared my client to (p. 348) answer these questions. I suggest we bring the jury back, and, you know, we can do this — have an opportunity to talk to him, at least about what I am going to ask. I have an alternate argument under 609 of the Federal Rules of Evidence that I have set forth.

The conviction, again I do not thing [sic] that would be proper.

Referring to Judge Burger, now Chief Justice Burger in the opinion of Gordon versus the United States. The impeachment value is slight. These would be the prejudicial impact of the conviction in this case. And there's very little bearing with respect to the veracity and narcotics conviction or drug related conviction has nothing to do with veracity, which I believe that is all that it is appropriately being introduced for.

THE COURT: Mr. DiScenza.

MR. DISCENZA: Your Honor, the rule is very clear, and it says that a conviction that carries a penalty in excess of one year or a conviction which has to do with moral turpitude or dishonesty may be introduced for impeachment, and I think that that, you know, that's the rule. It obviously carried a penalty of over one year, and we get to impeach him by asking him about it by crossing examining him about it.

MR. MARCUS: It is clearly discretionary.

(p. 349) THE COURT: It is a possession of marijuana charge?

MR. DISCENZA: That's right, possession of controlled substance.

All right. I am giving the court a DiScenza on interpretation of Illinois law, so I am not an expert on Illinois law, what I have been able to find over the lunch hour is that 710 is possession of marijuana, that relates to possession of marijuana. The other section that Your Honor read out was 1402.

MR. MARCUS: 1410.

THE COURT: That is a possession of controlled substance which does not included [sic] marijuana but hard narcotics.

MR. MARCUS: That's correct.

MR. DISCENZA: I understand that he has been arrested, and our rap sheet indicates, with both of those offenses.

MR. MARCUS: It is my understanding that there is only one conviction with respect to this particular case.

The inquiry I believe has to be weighed.

THE COURT: All right. I am going to do this, if you want to put on your defendant now; the only thing that he has got to worry about is perjury, everything (p. 350) else that he is going to say is going to be self-serving, the only thing that he has got to be worried about is perjury, get up here and make the statement and say you can't use it against him. If he gets up here and makes a false statement on the stand and DiScenza asks him, and if it is just possession of marijuana, I am not going to let the government bring it in. If he is charged with the other, and he says on the stand that isn't so, then I am expecting to see this gentleman back here again probably before another judge on a perjury charge.

Put your client on the stand and already stated what I am going to make my ruling one [sic]. I am going to leave it to you and your client to state what you are urging upon me and let him get up here on the stand under oath and say he wasn't charged with possession of a controlled substance, other than marijuana, it was a simple marijuana thing, I was put on 18 months. Shoot, everybody knows

everybody has a little marijuana around, I didn't do anything for 18 months, nothing wrong with that, no moral turpitude, I was a good boy and I got expunged, and based on that testimony the government is not going to be allowed to bring it in. I am expecting they are going to find out if that is true or not and your client will pay the consequences if it isn't.

MR. MARCUS: Let me suggest this to the (p. 351) court, I will attempt to run down the actual charge. He may have been charged with the other, too I am not suggesting that he wasn't. He may have been charged with the possession of a controlled substance other than marijuana. I am not trying to mislead the court in that respect. You are just concerned with what he entered a plea to, I believe, not with what he is charged with. Indeed, he may have been charged with the other more serious crime.

THE COURT: What the conviction was, yes, sir.

• • •

(p. 353) THE COURT: I have stated that if the defendant establishes, even by his own testimony and no record, but by his own testimony that all he pled to was possession of marijuana, and that he didn't know anything about anything other than he thought that he was expunged and had a basis for thinking that he was expunged and that was the end of it, then I am not going to let the government bring that in. If it is a controlled substance other than marijuana, I think that involves moral turpitude and I think that the government is entitled to go into it, but that is a question that remains.

The government has satisfied me that there was a conviction or a plea to something that involves a felony. I am saying that under the argument that you have made, if it is possession of marijuana under 403 or 609 or any of the other matters that would be pertinent, even though it may be relevant, I am not going to let the government go into it on (p. 354) a simple possession of marijuana rap.

And the question is whether it is more than that and whether or not there were implications thereafter which indicated that he did not perform the probationary sentence that was involved satisfactorily.

MR. MARCUS: Okay. I am sure the court will give me adequate time to again do my best. I am sure that the U. S. Government has far more power at its disposal to determine whether or not or what the disposition of this case is.

THE COURT: And I will expect them to utilize whatever means that they have to, with the data and the information which is in evidence here, to be able to check it out themselves, and I expect them to.

MR. MARCUS: So, you are putting alike [sic] burden on then [sic] to check this out.

THE COURT: I am putting alike [sic] burden on them, yes, sir, but there is one person that has some personal knowledge that counsel doesn't have, and you have the opportunity to obtain that personal knowledge that nobody else has from your client.

MR. MARCUS: Okay.

• • •

(p. 356) (Recess.)

MR. DISCENZA: Your Honor, for the record, I have just talked to the police officer from Chicago that is up here. I want to put on the record and know what we found out. In December of 1981 he, prior to Mr. Luce being arrested, pulled the criminal offense report the, State of Illinois offense report and it indicates as follows. It gives charges, convictions shows one charge of battery, damage to property.

Three possessions of controlled substances.

Six charges of unlawful use of weapon.

One charge of battery.

One charge of loss of property.

One charge of false I.D. numbers.

Of this, it shows a conviction of a controlled substance, it was not expunged as of 1981.

• • •

(p. 357) THE COURT: Because the court is allowing the evidence pertaining to flight to come in in light of the information that Mr. DiScenza has indicated, it may be, I am not making that decision, but it may be that the defendant may be permitted to testify concerning the circumstances pertaining to the arrest if that's all the testimony that the defendant is going to get into. Even if I find otherwise that the government is entitled to bring in the conviction, I will consider as to whether or not the defendant may still be permitted to testify as it bears upon the flight matter without the introduction of the information that has been obtained. I am considering that, but if he is going to go into general testimony relating to all of

the merits of the case, if I were otherwise disposed (p. 358) that the conviction is a proper matter to go into as it relates to credibility, I am just considering that separation as it relates to the issues that would pertain to the defendant's opportunity to testify as it pertains to the flight matter.

I will hear from you further, either or both counsel, as to that possibility, but I am considering that.

MR. MARCUS: Can I ask the court to reconsider the 609 argument. I accept Mr. DiScenza's representation of what the circumstances are with respect to the conviction. I am checking it out, but I certainly do not quarrel with him.

And I believe that I would like to note for my memorandum in motion that there is and incorrect statement on that, and I would ask the court, based on what Mr. DiScenza has recently reported, I would ask the court to separately consider under 609 whether or not that conviction should come in under that basis, that is, whether or not the prejudicial impact of the conviction would be outweighed by the probative value of it.

THE COURT: All right, sir. I will consider it. As I say, I may consider it as to the extent of testimony as it pertains to flight, or alleged flight would be a better way of putting it.

All right. Are we ready to proceed?

• • •

EXCERPTS OF TRIAL IN
UNITED STATES v. LUCE, et al.
MEMPHIS, TENNESSEE
WEDNESDAY, MARCH 24, 1982

• • •

(p. 421) THE COURT: Is there any further information in the matter on trial concerning the motion in limine situation as it pertains to the record or allegation as to the defendant Mr. Luce?

MR. DISCENZA: May it please the court, just about two minutes ago we checked with Lieutenant Flemming with the Chicago Police Department Identification Division, who indicates that the conviction on Mr. Luce was under 56 (p. 422) and a half 1402 it is still on record, and the Chicago Bureau of Identification or the identification section shows no expungement on that conviction and I think Mr. —

MR. MARCUS: Let me say that I don't want to mislead the court in any way. I have made my investigation, also, but I do not have any indication to indicate otherwise.

THE COURT: There is still before us the 609 question which counsel has raised, as well as the other matter, which would make it, in accordance with the defendant's context, inadmissible under the Illinois law. We don't think that the Illinois law applies.

MR. MARCUS: Your Honor, just to clarify that point, I have no information, I don't mean to interrupt the court, that argument — I think that the court is correct, so I don't want to mislead you or suggest otherwise with respect to that, I think that the argument at this point is just to 609.

THE COURT: It appeared to me that way, counsel, though during the course of yesterday and argument and the back and forth that came about, there was some question as to whether or not the Illinois law or some other provision might support the defendant's position that the government ought not to be able to get into as a matter of impeachment or credibility.

(p. 423) And the other argument relates to whether the probative value substantially outweighs the prejudicial affect of introduction of such evidence.

The court indicated yesterday in considering this matter, if it were a marijuana possession matter, that likely the court would consider that it should not be brought up. If it were a conviction for a controlled substance other than marijuana, the court's feeling was and is that that is a crime involving moral turpitude, and it would, therefore, fall within the pattern of admissible evidence for purposes of impeachment.

Now, I made one further suggestion yesterday as a possibility, that I invite counsel on either side to comment upon or address or state their position, that there might be a third basis, a hybrid sort of situation where, if the defendant were permitted to take the stand and testify concerning the evidence of flight, which was admitted over the objection of that same defendant, that the court might

permit the witness to testify in that area without allowing the government to bring in the impeachment or credibility factor. But if the defendant were going to take the stand and testify generally pertaining to his situation beyond the flight circumstance, then that the court would allow the government to go into that as a matter of impeachment.

So, I think that we are to that third alternative (p. 424) situation if the parties want to be heard about that.

MR. MARCUS: I recognize the court's invitation, but, you know, I have no comment on it. The court wants to make it available, certainly we will consider it if not —

THE COURT: Before I hear from you, do any other counsel, I have permitted each of you to state your position concerning these matters because in a conspiracy matter. I realize there may be a washover effect insofar as other defendants are concerned, if either of you want to be heard, I will hear from you about that alternative on these matters that relate to the prior conviction.

MR. MARTY: May we confer a second?

THE COURT: Yes, sir.

MR. MARTY: Your Honor, I think we have stated our position for the record, and we will have no comment on that either.

THE COURT: All right. Mr. DiScenza.

MR. DISCENZA: Of course, Your Honor, we think that under the rule that we ought to be able to use it as impeachment no matter what the defendant says. I mean, his credibility is still placed in issue, but we understand

Your Honor's ruling, whatever Your Honor wants to do about it, we will abide by it.

We might just call this to the court's attention. (p. 425) Obviously, the cross-examination is going to be on his perception of what was happening, his familiarity with police procedures, and et cetera. It very well could be material as impeachment, but as a direct matter of evidence, if he testifies about the events that occurred on December the 18th, you know, obviously, we would want to bring out he had gone through it before. He knew what police procedures were, he had prior arrests, and knew that he was supposed to stop, and et cetera.

THE COURT: I am going to rule, and note the exception on both sides, I am going to rule that the evidence pertaining to the prior offense of the defendant is sufficiently established that the government would be able to cross-examine the witness Luce if he takes the stand generally to testify to ask him with regard to his offense or prior conviction, which the court determines involves an offense of a penalty of more than one year and an offense that involves moral turpitude. And we would feel that the provisions of 609 would not preclude the government from going into that.

Then, on the other hand, if the defendant takes the stand and limits his testimony only to the circumstances pertaining to the alleged flight matter, affording him the opportunity, which I don't think that the rules would strictly support, but affording him the opportunity, if he (p. 426) wants to testify concerning, the circumstances of alleged flight, that he may do that without the conviction being brought in. But, if it goes beyond that at all into

other elements, I don't know anything about drugs, I have never had any dealings with drugs, I don't — whatever else, then the door is open to the government to go into the matter of credibility as it relates to the defendant in respect of a prior conviction or a prior offense, and that is the court's ruling.

MR. MARCUS: Your Honor, May I be heard just briefly. It is our contention that the fact, I obviously discussed this further with my client, but it is our contention, and I wish to note for the record, that we do not waive our objection to the flight evidence by this court's ruling. And if, indeed if anything, the court's suggestion on it would highlight that particular testimony that we have heard in this case from the government's witnesses. And it is not our position, and I want it perfectly clear, that we feel that this is a satisfactory resolution of the flight evidence that was presented, and I want that noted for the record.

THE COURT: I note the exception of the defendant, I have already noted the exception of the government, and that is very clear, you are not waiving that objection if you decide that you want to present your (p. 427) witness to testify in either or both directions, you just know what the court's ruling is and the record is clear about it.

MR. MARCUS: All right. I think that we have one other matter.

Have you concluded the 609 matter?

I assume we have.

THE COURT: Yes.

• • •

(p. 452) MR. MARCUS: We have no further witnesses. I won't [sic] to confer with Mr. Luce. I just got the court's ruling. I will tender my instructions, and I just want to confer with my client.

• • •

(p. 453) THE COURT: Are we ready to proceed?

MR. MARCUS: Your Honor, at this time The defense will have no further testimony and we will rest.

• • •

CR. NO. 81-20341-W

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNTED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD LUCE, et al

Defendant.

LUCE'S MOTION AND MEMORANDUM FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR A NEW TRIAL

Now Comes the Defendant EDWARD LUCE, by his attorney, JAMES I. MARCUS, and moves this court for Judgment of Acquittal or in the Alternative for a New Trial in support of this motion Defendant states as follows:

1. The court erred in failing to grant the Defendant's motion for judgment of acquittal at the close of the government's case as to Count I for failing to prove by the standard set forth in *Enright* that a conspiracy existed. *United States vs. Enright,* 579 F. 2d 980 (6th Cir. 1978).

2. The court erred in failing to grant Defendant's motion for judgment of acquittal at the close of the governments case as to Count III because the government failed to meet its burden of proof on the substantive count. (See Trial Brief).

3. The court erred in failing to limit the government's proof as to the impeachment by conviction of the

Defendant Edward Luce, who was thereby denied the right to testify. See Motion in Limine and supporting Memorandum which are incorporated by reference.

4. The court erred in failing to strike the testimony of officer Mattox, the latent fingerprint examiner, because of a failure to connect the latent print of Defendant Luce with the evidence introduced at trial.

5. The court erred in failing to give Defendant's requested instructions and in giving those instructions objected to by the defense specifically in giving the "Flight Instruction" over Defendant Luce's objection.

For the foregoing reasons Defendant Luce respectfully requests that this motion for judgment of acquittal be granted or in the alternative that he be granted a new trial.

Respectfully submitted,

JAMES I. MARCUS
Attorney for Defendant Luce

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NO. 81-20341

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

EDWARD LUCE, et al.

ORDER

(Filed April 1, 1982)

Following a jury trial in this case, in which the defendant was found guilty on certain charges, defendant Edward Luce has moved for judgment of acquittal or for a new trial. The Court has considered its notes and the record in the case, as well as the motion and memorandum filed on behalf of the defendant.

The defendant contends that the government failed to prove under the standards of *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978), that a conspiracy existed. The proof, however, if accepted by the tries of fact, indicated that the defendant Luce had a close association with one of the other defendants; had sold another co-conspirator a controlled substance; and was involved in the automobile in which a substantial quantity of cocaine was located; and that he had taken steps to attempt to conceal his identity with regard to the ownership of the automobile. Further, the defendant's fingerprints were found on one of the containers in which the cocaine was located during the course of the conspiracy. There was obviously sufficient evidence under the *Enright, supra,* or other appropriate standards to find the defendant involved in the alleged conspiracy under Count I.

The Court did not grant the defendant's motion for acquittal during the trial because the government met its proof, if the proof were accepted by the triers of fact, to establish the defendant's involvement, not only in the conspiracy, but in the substantive charge in which his automobile, his fingerprints, and his past association indicated involvement, aiding and abetting and participation in the substantive count charged in Count III.

The Court considered the defendant's motion to limit the government's proof with respect to whether the government would be allowed to cross-examine the defendant if he took the stand concerning a prior felony conviction. There was no basis established under the rules as to why the conviction should be excluded and it involved a drug offense in which in the Court's view, was both a felony and involved moral turpitude. Furthermore, the government stated that it would allow the defendant to testify on a limited basis without bringing in the proof of an alleged prior offense challenging credibility, if the defendant chose to testify concerning the circumstances of his arrest and purported flight from the attempted arrest. There was no error committed in respect of this matter, and the defendant exercised his option not to testify.

The Court determined that the testimony of the Memphis Police Officer investigating the crime scene was admissible with regard to steps taken in seeking fingerprints, and that there was a sufficient connection shown and established, not only by the testimony of Police Officer Mattox, but also through the testimony of other persons present at the scene to connect the lifting of prints with the particular print of the defendant Luce from the bag containing cocaine. There was no error in not striking the testimony of this witness in that respect.

The Court considered, with counsel for the defendant, instructions to be utilized in the case. For the most part, the Court used purposed instructions suggested by the defendant, or the substance of these instructions. The Court otherwise instructed in accordance with the law which has been utilized many times in this Court and in many instances supported by Sixth Circuit decisions.

For the reasons stated, the defendant's motion for judgment of acquittal and/or for a new trial is overruled. The Court will proceed to a disposition upon receipt of the pre-sentence report.

It is so ORDERED this 1st day of April, 1982.

/s/ Harry W. Wellford
HARRY W. WELLFORD, JUDGE
United States District Court

UNITED STATES DISTRICT COURT

Western District of Tennessee
Western Division

Docket No. 81-20341-01-W

JUDGMENT & COMMITMENT ORDER

(Filed May 24, 1982)

Defendant: Edward Luce

In the presence of the attorney for the government the defendant appeared in person on this date: May 18, 1982. Counsel:

( ) Without Counsel

(X) With Counsel—James Marcus, retained.

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assis'ance of counsel.
Plea:

( ) Guilty, and the court being satisfied that there is a factual basis for the plea,

( ) Nolo Contendere, (X) Not Guilty

There being verdict of:

( ) Not Guilty. Defendant is discharged

(X) Guilty.

Finding & Judgment: Defendant has been convicted of as charged of the offense(s) of Conspiracy (to possess and distribute a Schedule II controlled substance [cocaine];

Possession with intent to distribute a Schedule II controlled substance (cocaine); and aiding and abetting in same, in violation of Title 21, United States Code, Sections 846 and 841(a)(1) and Title 18, United States Code, Section 2, as charged in Counts 1 and 3 of the indictment.

Sentence or Probation Order: The court asked whether defendant had anything to say why judgment should not

be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS and fined in the amount of $3,000.00, said fine being a COMMITTED FINE, as to Count 1. As to Count 3, FOUR (4) YEARS, to run concurrently with sentence imposed in Count 1, and THREE (3) YEARS Special Parole Term to follow, and a $3,000.00 COMMITTED FINE, making a TOTAL SENTENCE of:

FOUR (4) YEARS imprisonment, followed by
THREE (3) YEARS Special Parole Term, and a
$6,000.00 COMMITTED FINE.

Special Conditions of Probation: The defendant has been granted leave by the Court to report to the institution designated by the Attorney General at his own expense no later than Noon, June 28, 1982. Upon designation of an institution to the United States Marshal, the Clerk will issue an Order to Surrender, stating when and where the defendant is to report. Upon receipt of the Order, the defendant will report to the Office of the Clerk to acknowledge receipt of the Order.

Additional Conditions of Probation: In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by: U.S. District Judge Harry W. Wellford.

Approved: W. H. Ewing, Jr., U. S. Attorney.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

March 26, 1984

Robert B. Williams, Esq.
Williams & Marcus
111 West Washington Street
Suite 1866
Chicago, Illinois 60602

Re: Edward Luce v. United States
No. 83-912

Dear Mr. Williams:

The Court today entered the following order in the above case:

"The petition for a writ of certiorari is granted. Justice Stevens took no part in the consideration or decision of this petition."

Enclosed are memorandums describing the time requirements and procedures under the rules. Please read them carefully.

I have been instructed to inform you that Rule 34.1(a) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not have printed on this page the title of the case or any other descriptive matter. A sample sheet is enclosed.

The additional docketing fee of $100, Rule 45(a), is due and payable.

Very truly yours,

Alexander L. Stevas, Clerk

By /s/ June M. Hoffmann
(Miss) June M. Hoffmann
Assistant Clerk

Enclosures